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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MEINI FOSTER, Defendant and Appellant.	A155739 (Alameda County Super. Ct. No. 17CR000418)

A jury convicted Meini Foster of two counts of forcible oral copulation and one count of forcible rape and found the kidnapping enhancements were true. The trial court sentenced Foster to an indeterminate term of 75 years to life in prison.

On appeal, Foster contends the judgment should be reversed because the trial court committed constitutional error by finding the sexual assault victim unavailable and admitting her preliminary hearing testimony; the prosecutor committed misconduct in closing argument; and the trial court erred in admitting evidence of prior sexual assault under Evidence Code section 1108. Foster further argues that he is entitled to remand for a hearing to determine his eligibility under the mental health diversion statute. (Pen. Code,[1] § 1001.36.) Finally, Foster challenges the imposition of

[1] All undesignated statutory references are to the Penal Code.

several fines and fees. Other than an error in calculating the amount of the criminal conviction fee, which the Attorney General concedes was error, we reject Foster's contentions and affirm the judgment as modified.

EVIDENCE AT TRIAL

A. *Charged Sexual Offenses*

In 2016, L. Doe (L.) was 27 years old and worked as a teacher at an English language school in San Francisco. L. commuted to work from Walnut Creek by taking Bay Area Rapid Transit (BART) to the Powell Street station, which was located near her workplace.

Around 5:30 p.m. on December 15, 2016, L. attended a holiday party after work, where she ate a little bit and drank three beers and a glass of champagne—possibly more. L. was not accustomed to drinking and the alcohol affected her more than she realized.

L. left the party alone around 10:30 p.m. She went to the Powell Street BART station to head home. L. intended to take the Pittsburg/Bay Point train back to Walnut Creek, but she got on the wrong train and ended up getting off at the Dublin/Pleasanton station.

Meanwhile, Foster got off a train at the Dublin/Pleasanton station several minutes earlier and left the station. The BART surveillance video played for the jury showed Foster masturbating under his clothes as he watched people entering and leaving the station. Foster then reentered the station.

As L. was stumbling in the station, Foster approached her and put his arm around her. Foster and L. walked around the platform before boarding a San Francisco-bound train. They rode the train for three stops and got off at the Bay Fair station in San Leandro. L. recalled leaving the BART station with Foster and trying to get away from him. But she was unable to get

away from Foster because he was holding onto her arm, and he was much larger and heavier than she was. L. had been wearing eyeglasses for nearsightedness but lost them at some point after leaving the Bay Fair station.

Eventually, L. and Foster came to an isolated, dark area outside of the BART station. Foster pushed L. down to her knees. L. screamed for Foster to stop and to let her go. In response, Foster said, "Be cool or I'll have to hurt you." He then unzipped his pants, held back her head and put his penis into her mouth. For what seemed like a long time, Foster moved his penis back and forth inside L.'s mouth. Eventually, L. fell backwards. She tried to stand up and run, but her feet were cold and numb, and she could not get up. She tried to crawl away, but Foster caught her. L. was on her hands and knees and screaming; Foster still would not let her go. Instead, he pulled down the tights that she had been wearing under her dress. With L.'s tights down to her knees, Foster attempted to put his penis into L.'s vagina. L. could feel Foster's penis pressed against her, but Foster was having trouble inserting it into her vagina because the position of her tights were restricting his access. Eventually he was able to get an inch or two of his penis inside L. Afterwards, L.'s vagina was sore. L. was "[v]ery" certain there was "actual penetration."

Foster also tried to penetrate L.'s anus with his penis. L. could feel pressure from Foster's penis being pressed against her anus, and after the incident she felt pain in that area. Foster then pulled L. back up and made her orally copulate him again as he stood over her with his hand in her hair. L.'s hair got tangled in her pierced earrings, which caused both of her earlobes to tear. Eventually, Foster stopped and walked away.

L. got up and followed the train tracks hoping to find someone who could help her. She came to a street and walked up to the first house, but as she approached the front door, a man and a woman came out waving their arms and frightened L. away. L. walked down the street and saw a police car at the corner. She got the attention of the police and told them what happened.

San Leandro Police Officer Diljeet Sekhon was on duty during the early morning hours of December 16, 2016. At approximately 3:06 a.m., Officer Sekhon received a dispatch call regarding a possibly intoxicated individual in front of a residence on Begonia Drive. As Officer Sekhon was driving to the location, he saw a woman on the corner of Halcyon Drive and Oleander Street who was flagging him down. Officer Sekhon pulled over and spoke to the woman, who identified herself as L. Officer Sekhon saw that L.'s makeup was smeared and her clothes were very muddy and dirty.

L. appeared to be somewhat disoriented and unclear about what was happening. L. told Officer Sekhon that she had been dragged off a BART train and pulled into the dirt where she was raped. Subsequently, Officer Sekhon, L. and another officer went over to the railroad tracks between Halcyon Drive and Hesperian Boulevard to see if they could locate the scene of the attack, but they were unable to find the location or L.'s missing eyeglasses.

L. sustained numerous bruises to her arms, legs, and buttocks. She also had scrapes and abrasions on her knees and chest. L.'s earlobes were bloody and scabbing over. She had abrasions and redness on her chin, neck, and jaw.

L. was taken to the hospital, where she submitted to a sexual assault examination (SART). During the examination, L. stated she had no pain or

bleeding. As to vaginal penetration, L. stated that she did not think her assailant's penis had gone "all the way in." The examination of L.'s genitals showed redness at the inside of her labia, as well as caked mud on the inside of her vagina. There also was soil on her buttocks.

Multiple swabs were taken: from L.'s mouth, outside and inside of her vagina, and her anus. The DNA collected from the SART was sent to the Department of Justice DNA lab and it was found to be a match with Foster's DNA. Foster's DNA was found on the outside and inside of L.'s vagina.

A warrant was issued for Foster's arrest, and an interagency release flyer was circulated that identified him. A BART police officer recognized Foster's photograph on the flyer and knew him to frequent BART stations. The officer located Foster at the San Francisco Civic Center BART station and arrested him.

B. *Foster's Prior Sexual Offenses*

1. *T. Doe*

T. Doe (T.), a 27-year-old homeless woman, testified that she occasionally stayed outside of the Pittsburg BART station. In August 2015, Foster sexually assaulted her near that station. Foster touched her breasts with his hands. When T. told Foster to stop, he put her arms behind her back and tried to put her hands inside his pants. Foster also rubbed T.'s buttocks with his hands. When T. told Foster to stop, he hit her in the head with his fist. Foster was arrested for sexual battery.

2. *V. Doe*

V. Doe (V.) testified that on the morning of June 24, 2016, she took a San Francisco municipal bus to go to cheerleading practice. She was then 16 years old. The bus was very crowded, so V. was standing and facing a side window. Foster approached her and stood just a couple of inches away from

her, which made her uncomfortable. Foster then touched V.'s leg and buttocks with his hand. V. was wearing a dress and a jacket. V. tried to move so that her duffle bag was between her and Foster, but before she could do so, Foster slapped her butt. As she was trying to distance herself from Foster, V. saw in the window's reflection that Foster had one of his hands in his pants. When she turned around, V. confirmed that one of Foster's hands was down his pants, and he was touching her with his other hand. Frightened by Foster's behavior, V. attempted to move away from him, but he remained close to her. V. next felt something warm on the back of her bare leg and realized Foster had ejaculated on her. He then started laughing.

V. got off the bus at her stop so she could transfer to another bus. V. wiped off the ejaculate from her leg and got onto the next bus to her final destination. When V. saw Foster get on her bus, she became scared. V. called 911 and the operator told her to tell the bus driver to pull over. After the bus stopped, V. spoke with a police officer and identified Foster as the man who attacked her.

C. *Defense Case*

Foster presented evidence from an expert in the area of memory and suggestibility, who discussed the effects of intoxication on a person's ability to recall events.

DISCUSSION

I. Admission of L.'s Preliminary Hearing Testimony

Foster contends the court violated his rights under the United States and the California constitutions (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15.) to confront the witnesses against him when it found L. unavailable to testify at trial and admitted her preliminary hearing testimony instead.

A. *Background*

Prior to trial, the prosecutor advised the trial court and defense counsel that L. might be unwilling to testify. The prosecutor reported that L. had refused to meet with the district attorney's office. However, the prosecutor's plan was to fly L. to Alameda County from New York, where she then lived, so that she could advise the court whether she was going to testify. Defense counsel indicated that Foster was "prepared to enter a personal waiver of any appeal rights associated with her being unavailable, if we can reach a stipulation."

At the scheduled hearing to determine her availability to testify at trial, L. testified under oath that she was appearing under subpoena and that she did not want to be there. In response to the prosecutor's questions, she stated she could not and would not testify at trial. L. further explained: "Honestly, the last year and a half has been a hell hole of trying to hold onto toxic memories. And . . ., I already testified in the pretrial and I can't do it again. [¶] And I could barely get out of bed after that for weeks. . . . I still have nightmares about it. [¶] . . . I've thrown up twice this morning even thinking about being here." She was steadfast in her position:

"[The prosecutor:] Q. Will giving you any additional time to consider this make any difference.

"[L. :] A. No.

"Q. Is there anything I can do to get you to change your mind?

"A. No.

"Q. Is there anything the Court can do to get you to change your mind?

"A. No."

Defense counsel did not ask L. any questions and submitted the matter without argument.

The trial court found L. to be an unavailable witness based on "her fairly emphatic refusal to testify[.]" Defense counsel did not challenge the ruling and did not object when L.'s preliminary hearing testimony was read to the jury.

B. *Analysis*

L.'s preliminary hearing testimony was admitted because the trial court found that she was unavailable to testify pursuant to Evidence Code section 240, subdivision (a)(6). Under that provision, a witness is unavailable if he or she is "[p]ersistent in refusing to testify concerning the subject matter of the declarant's statement despite having been found in contempt for refusal to testify." The proponent of the evidence has the "burden of showing by competent evidence that the witness is unavailable." (*People v. Smith* (2003) 30 Cal.4th 581, 609 (*Smith*).)

When, as here, the prosecution has exercised due diligence to make a witness physically available in the courtroom, but the witness nevertheless refuses to testify, the witness is properly determined to be unavailable for the purpose of admitting the witness's prior testimony " 'if the court makes a finding of unavailability only after taking reasonable steps to induce the witness to testify *unless it is obvious that such steps would be unavailing*.' " (*Smith, supra,* 30 Cal.4th at p. 624, italics added.) "Trial courts 'do not have to take extreme actions before making a finding of unavailability.' " (*Ibid.*)

Foster contends the trial court failed to take necessary steps to compel L.'s testimony before declaring her unavailable. The Attorney General counters that the claim is forfeited because Foster did not object to the court's finding that L. was unavailable. In his reply brief, Foster essentially concedes that he did not preserve the claim below. He instead urges us to

exercise our discretion to review this "pure issue of law that require[s] no further factual development[.]"

We conclude the argument is forfeited. Our Supreme Court has made clear that a claimed violation of one's rights under the confrontation clauses of the state and federal Constitutions is forfeited on appeal if it is not raised in the trial court. (*People v. Tafoya* (2007) 42 Cal.4th 147, 166; *People v. Seijas* (2005) 36 Cal.4th 291, 301.)

Nevertheless, even overlooking this obvious forfeiture, Foster's claim fails on the merits. "A criminal defendant has the right, guaranteed by the confrontation clauses of both the federal and state Constitutions, to confront the prosecution's witnesses. . . . [¶] Although important, the constitutional right of confrontation is not absolute. . . . 'Traditionally, there has been "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] which was subject to cross-examination. . . ." [Citations.]' [Citation.] Pursuant to this exception, the preliminary hearing testimony of an unavailable witness may be admitted at trial without violating a defendant's confrontation right." (*People v. Herrera* (2010) 49 Cal.4th 613, 620-621.)

Foster acknowledges that the trial court could not have held L. in contempt because she was a victim of sexual assault. (Code Civ. Proc., § 1291, subd. (b).) Nevertheless, Foster contends the trial court did "virtually nothing to try to induce L. to testify." He claims the trial court could have imposed "a fine or community service[,]" and one of these consequences "would have likely induced L. to endure the brief amount of time, inconvenience and possible embarrassment of testifying."

We are not persuaded by Foster's attempt to minimize the emotional toll that testifying in this case exacted from L. She flew from New York to California to inform the trial court that she could not testify. Clearly, the time and inconvenience of testifying were not of paramount concern to L. Moreover, L. did not merely refuse to testify because it would be "embarrassing." She described her life since the time of the sexual assault in vivid terms as a "hell hole" full of "toxic memories." Following her testimony at the preliminary hearing, in which she was forced to relive one of the most horrific nights of her life, she could "barely get out of bed for weeks[.]"

As our Supreme Court explained in *People v. Cogswell* (2010) 48 Cal.4th 467, 478: "Although any crime victim may be traumatized by the experience, sexual assault victims are particularly likely to be traumatized because of the nature of the offense. To relive and to recount in a public courtroom the often personally embarrassing intimate details of a sexual assault far overshadows the usual discomforts of giving testimony as a witness. And the defense may, through rigorous cross-examination, try to portray the victim as a willing participant. [Citation.] Also, seeing the attacker again—this time in the courtroom—is for many sexual assault victims a visual reminder of the harrowing experience suffered, adding to their distress and discomfort on the witness stand. [Citation.]" It is for these very reasons that the Legislature amended Code of Civil Procedure section 1219 to add subdivision (b), which prohibits a trial court from jailing a sexual assault victim who refuses to testify against the attacker. (*Cogswell*, at p. 478.)

Contrary to Foster's contention, it is highly unlikely that L. would have changed her mind and testified had the trial court threatened her with a fine or community service. As these steps would be unavailing, the trial court

was not required to take further actions before making its unavailability finding. (*Smith, supra,* 30 Cal.4th at p. 624.) Under the circumstances, we conclude that the trial court properly determined that L. was unavailable for purposes of admitting her preliminary hearing testimony at trial.

II. Claims of Prosecutorial Misconduct

Foster claims that the prosecutor committed misconduct in four separate instances during closing argument by: 1) telling the jury it could consider the lesser included offense of attempted rape only after finding Foster not guilty of rape; 2) vouching for L.; 3) appealing to the jury's passions and prejudices; and 4) misstating the reasonable doubt standard.

" ' " 'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' " ' " (*People v. Charles* (2015) 61 Cal.4th 308, 327.) Prosecutorial misconduct does not warrant reversal under state law " 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071.) Bad faith is not required to establish prosecutorial misconduct under state law. (*People v. Hill* (1998) 17 Cal.4th 800, 821.) Indeed, our Supreme Court has stated, " '[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.' [Citation.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667.)

A. *Acquittal-First Rule*

Foster argues that the prosecutor committed error by misstating the acquittal-first rule during closing argument. We reject this argument.

1. *Background*

During closing argument, the prosecutor, in discussing the greater and lesser offenses said, "If you find the defendant guilty of rape on Count 2, then there's absolutely no need for you to consider the lesser included offense of attempted rape. Just leave that verdict form blank. Only if you found the defendant not guilty of rape would you consider the lesser charge." Foster concedes that his trial counsel did not object to the prosecutor's comments regarding the sequence in which the jury should consider the offenses.

2. *Analysis*

Under California's "acquittal-first" rule, "a trial court may direct the order in which jury verdicts are returned by requiring an express acquittal on the charged crime before a verdict may be returned on a lesser included offense." (*People v. Bacon* (2010) 50 Cal.4th 1082, 1110.) However, it is error for a trial court to instruct a jury not to " 'deliberate on' or 'consider' " the lesser-included offenses before reaching a conclusion on the greater offense. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 335 (*Kurtzman*).) "Instructions should not suggest that a not guilty verdict must actually be returned [on the greater offense] before jurors can consider remaining offenses. Jurors may find it productive in their deliberations to consider and reach tentative conclusions on all charged crimes before returning a verdict of not guilty on the greater offense." (*Id.* at p. 336, fn. omitted.) Because error under *Kurtzman* "implicate[s] California law only," prejudice is shown if the error had " 'a reasonable probability of an effect on the outcome.' " (*People v.*

Berryman (1993) 6 Cal.4th 1048, 1077, fn. 7, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

As an initial matter, Foster forfeited any challenge to the prosecutor's comments by failing to object in the trial court. "It is well settled that making a timely and specific objection at trial, and requesting the jury be admonished . . . is a necessary prerequisite to preserve a claim of prosecutorial misconduct for appeal." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328.) Foster correctly notes that no objection or request for admonition is required if either would not cure the harm caused by the error. This exception does not apply here, where the trial court easily could have cured the error by correcting the prosecutor's misstatement. (*Ibid.*)

Even if Foster properly preserved the issue, his challenge fails on the merits. First, it is not even entirely clear that the prosecutor committed *Kurtzman* error as he did not tell the jury the order in which they should deliberate. Rather, the comments were made in the context of how to fill out the verdict forms. In any event, Foster cannot show prejudice from the prosecutor's comment.

In addressing the question of prejudice, we note our Supreme Court's admonition that there is an "inherent difficulty" in demonstrating prejudice from *Kurtzman* error. (*People v. Fields* (1996) 13 Cal.4th 289, 309, fn. 7.) That is because, "in the abstract," an erroneous instruction that a jury must acquit on a greater charge before turning to lesser charges "appears capable of either helping or harming either the People or the defendant. In any given case, however, it will likely be a matter of pure conjecture whether the instruction had any effect, whom it affected, and what the effect was." (*People v. Berryman, supra,* 6 Cal.4th at p. 1077, fn. 7.)

Given the evidence, we do not think it reasonably probable that, absent the prosecutor's comment, the jury would have acquitted Foster of the charged offenses in favor of the lesser-included offenses. Although L. initially told police that she did not think Foster penetrated her vagina, she testified that she thought that if Foster's penis did not go all the way inside her, it did not count as penetration. Nevertheless, L. was steadfast in her testimony that Foster "eventually . . . did put [his penis] inside. Not all the way but . . . maybe an inch or two."[2] So, too, on cross-examination, L. confirmed that she was "[v]ery" certain Foster's penis penetrated her vagina.

Moreover, L.'s testimony was corroborated by evidence that Foster's DNA was found both on the outside and inside of L.'s vagina. The SART exam also revealed redness inside L's labia minor which was consistent with vaginal penetration.

B. *Vouching*

Foster argues that the prosecutor improperly vouched for L. during his closing argument.

1. *Background*

During closing argument, the prosecutor argued: "L[.] has never been in any trouble before. Remember from the testimony, no arrests, no convictions, now she's just going to accuse an innocent man of rape? [¶] Plus, if L[.] really did have a consensual encounter with the defendant, why say it was sexual assault? When the police find her, she's by herself. The defendant is nowhere around. She's muddy. She could have said, [I] drank too much, I got lost, I fell in the mud, can you help me get home? That would

[2] The jury was instructed with CALCRIM No. 1000, which defines sexual intercourse for the purposes of rape as "any penetration, no matter how slight, of the vagina or genitalia by the penis."

be the end of it. There would be no SART exam, there would be no walking along the tracks trying to find a crime scene, no interview after interview. L[.] has absolutely no motivation whatsoever to lie about what happened to her." The trial court overruled defense counsel's objection that the argument constituted improper vouching.

On appeal, Foster asserts that the comment that L. "had never been in any trouble" impermissibly went beyond the evidence and suggested that she "had never been in trouble of *any kind*." (Italics added.) He also claims the prosecutor improperly placed the prestige of the government on L.'s credibility by stating that she had no motive to lie.

2. *Analysis*

In *People v. Rodriguez* (2020) 9 Cal.5th 474 (*Rodriguez*), our Supreme Court recently addressed the issue of differentiating vigorous argument and zealous advocacy, which are permitted, from improper vouching which is not. A prosecutor " ' "may make 'assurances regarding the apparent honesty or reliability of' a witness 'based on the "facts of [the] record and the inferences reasonably drawn therefrom." ' " ' [Citation.]" (*Id.* at p. 480.) However, " '[i]mproper vouching occurs when the prosecutor either (1) suggests that evidence not available to the jury supports the argument, or (2) invokes his or her personal prestige or depth of experience, or the prestige or reputation of the office, in support of the argument.' [Citation.]" (*Ibid.*)

In *Rodriguez*, a defendant convicted of crimes relating to an assault and battery in state prison argued on appeal that the prosecutor improperly vouched for the credibility of two testifying witnesses by asserting during closing argument that the witnesses, who were correctional officers, would not lie. (*Rodriguez, supra,* 9 Cal.5th at pp. 477-479.) The high court held that the prosecutor's argument generally asking, " 'what motive would

[Officer Stephens, the victim,] have to lie?' [citation], was proper because it did not 'suggest the prosecutor had personal knowledge of facts outside the record showing [Stephens] was telling the truth' or 'invite[] the jury to abdicate its responsibility to independently evaluate for itself whether [Stephens] should be believed.' [Citation.]" (*Id.* at pp. 480-481.) Furthermore, the prosecutor's argument regarding the length of Officer Stephens's career and that of the other testifying officer was based on the record and was proper as well. (*Ibid.*) However, the prosecutor's arguments that the officers would not lie because each would not put his " 'entire career on the line' " or " 'at risk' " did constitute impermissible vouching. (*Id.* at pp. 481-482.) The prosecutor's "career-related arguments 'convey[ed] the impression that evidence not presented to the jury, but known to the prosecutor, support[ed] the charges against the defendant[,]" (*id.* at p. 481), which "jeopardize[d] the defendant's right to be tried solely on the basis of the evidence presented to the jury.' [Citation.]" (*Ibid.*)

The case before us is different. Here, the prosecutor's argument positing, "L[.] has never been in any trouble before . . . no arrests, no convictions, now she's just going to accuse an innocent man of rape?" (see II.B.1., *ante*), did not suggest the prosecutor had personal knowledge of facts outside of the record showing L. was telling the truth. Contrary to Foster's assertion, there was no danger that the jury could have thought that the prosecutor meant that he had examined L.'s *entire life* and knew for a fact that she had never been in trouble for anything—ever. The prosecutor's argument that L. had not been in trouble was based upon facts in the record that she had never been arrested, and it was not error to point this out in closing argument.

Nor was it error to suggest to the jury that L. had no motive to lie. The prosecutor never suggested he had other evidence, unpresented to the jury, to support L.'s credibility (see *People v. Turner* (2004) 34 Cal.4th 406, 433 [prosecutor improperly referred to his personal knowledge of expert witness and his prior use of the witness]), or that he personally believed L. independent of the evidence, or that he was invoking the prestige of his office. (See *Rodriguez, supra,* 9 Cal.5th at p. 482 ["our cases have traditionally looked to statements of personal beliefs in assessing whether a prosecutor has improperly invoked personal privilege or the reputation of the office"].) Instead, his argument that L. had no motive to lie referred specifically to facts and inferences drawn from that evidence.

Accordingly, we conclude that viewed in context, the argument in this case was not based on matters outside the record and did not cross the line into impermissible vouching.

C. *Appeal to Passion and Prejudice*

Foster next contends that the prosecutor sought to appeal to the passions and prejudices of the jury when he argued on rebuttal that Foster "took advantage of L[.]'s intoxication once to sexually assault her. You should not be able to use it again as a way to avoid responsibility." Defense counsel objected on the ground of "[i]mproper argument," which the trial court overruled.

" 'A prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury.' [Citation.] '[I]t is improper for a prosecutor to appeal to the passion or prejudice of the jury.' " (*People v. Rivera* (2019) 7 Cal.5th 306, 337.)

It is not entirely clear what the prosecutor meant when he said, "[y]ou should not be able to use it again . . . to avoid responsibility." Foster contends the prosecutor improperly equated "the jury's consideration of L.'s intoxication in evaluating her credibility and Foster's allegedly taking advantage of that inebriation to violate her." The Attorney General argues there was no improper encroachment into the jury's consideration of the evidence; rather, the prosecutor argued that Foster took advantage of L.'s intoxication twice—once to sexually assault her and again to avoid criminal responsibility based on L.'s lack of memory.

Foster's vague "[i]mproper argument" objection did not help to clarify this ambiguity.[3] In any event, "in determining how jurors likely understood the prosecution's arguments, we do ' "not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." ' [Citations.]" (*People v. Cortez* (2016) 63 Cal.4th 101, 131 (*Cortez*).)

Here, not only was L.'s intoxication in evidence, it was the centerpiece of Foster's defense from the beginning of the trial through closing argument. Defense counsel set the stage for the intoxication/impaired memory defense in her opening statement: "[L.] doesn't remember a lot of things about this night. There are large gaps in L[.]'s memory . . . . And we do know from that BART surveillance that L[.] was clearly intoxicated." During trial, Foster's only witness was a memory expert who testified at length about the natural gaps in memory and the tendency of people to confabulate to fill those gaps, particularly when those gaps were caused by intoxication.

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[3] Despite this vague objection, we conclude, contrary to the Attorney General's contention, Foster has not forfeited this issue on appeal.

Then, during closing argument, defense counsel asserted: "Memory can be unreliable. Memory is . . . even more unreliable when alcohol and regret are involved, and sometimes we just can't remember what happened. . . . [¶] Again and again throughout this trial the evidence shows that there are significant gaps in L[.] Doe's memory from December 16th 2016. The evidence has shown that L[.] Doe remembered things inaccurately . . . ."

The prosecutor's remarks in closing argument on intoxication, although not a model of clarity, were responsive to defense counsel's argument that L. was an unreliable witness due to her intoxication—a fact in evidence. Contrary to Foster's assertion, we conclude that the prosecutor's passing remarks did not "appeal[] to the jury's natural sympathy for L." or "emotionally repulse the jury from any evaluation of L.'s veracity based on her state of inebriation on the night of the incident."

Even if the prosecutor's remarks were improper, any error was harmless under state and federal standards. The evidence showed that Foster preyed upon a particularly vulnerable victim, raping her and forcing her to orally copulate him, not once but twice. A BART surveillance video played for the jury showed Foster masturbating in front of the station minutes before he encountered L. Further, in the recent past, Foster sexually assaulted T. at a BART station and 16-year-old V. on a public bus.

The prosecutor's argument—even if interpreted in the most prejudicial light of arguing that the jury should not use L.'s intoxication to give Foster a pass—was mild in comparison to the graphic and disturbing evidence against Foster. Accordingly, it is not reasonably probable that Foster would have obtained more favorable results if the prosecutor had not made the challenged argument. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1134.) Likewise, even if the isolated comments somehow infected the trial with such

unfairness that it made the conviction a denial of due process, the error was harmless beyond a reasonable doubt. (See *People v. Rivera, supra,* 7 Cal.5th at p. 334.)

D. *Reasonable Doubt Standard*

1. *Background*

During closing argument, defense counsel argued that the reasonable doubt standard "stands for the principle that we will not, we cannot tolerate even the possibility of a mistake when liberty is at stake." She further argued: "At the end of your deliberations, you must be so convinced, you could be believing in your heart of hearts that Meini Foster committed some of the charges here but you still have a reasonable doubt. . . . [¶] Reasonable doubt doesn't mean that there must be a logical flaw in the state's evidence. If you are uncomfortable with the decision the prosecution is asking you to make, to convict Meini Foster of the four charges and the enhancements, then you have a reasonable doubt. Deciding beyond a reasonable doubt [e]nsures that every time you think about this case—and you will. Whether that's tomorrow, next month, 10 years from now—that you will know you made the right decision."

The prosecutor responded in his rebuttal argument.: "The defense talks about beyond a reasonable doubt as if it's some sort of impossible standard. That we have to go to the ends of the earth and back simply to prove a case beyond a reasonable doubt and that's not the case. [¶] The standard is not[—]contrary to what we sometimes hear on television—beyond a shadow of a doubt or beyond all doubt. The standard is simply beyond a reasonable doubt and that's because all things in life are subject to some possible or imaginary doubt. So you need to focus on what is reasonable, not just what is possible. [¶] And the defense attorney, I think she said that if

you're not entirely certain, you have to vote not guilty. The standard is not entire certainty . . . [¶] . . . [¶] A better . . . way to look at it is what is reasonable and what is not reasonable. I submit that *if you're pretty certain the defendant did it, you don't have a reasonable doubt*." (Italics added.)

Defense counsel objected that the prosecutor "[m]isstates the burden." The court overruled the objection and the prosecutor went on: "The defense also talks about a doubt is sort of—a reasonable doubt is doubt that's based upon a reason. That's not the law. The doubt has to be reasonable. If someone thinks the defendant might not be guilty because I didn't show the exact route that they took from the BART station to the train tracks, that's a reason but it's not reasonable. [¶] The defense talks about if the verdict makes you uncomfortable you have a reasonable doubt. Well, that's not the standard either and it's nowhere on the jury instructions. [¶] Look. Everyone feels some level of discomfort or uncomfortableness in returning a guilty verdict. That's because we're human beings, but having those very human emotions does not mean there is . . . reasonable doubt."

2. *Analysis*

"Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, 'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements [citation].' [Citations.]" (*People v. Centeno, supra,* 60 Cal.4th at p. 666.) While there is no categorical rule prohibiting reasonable doubt analogies, courts have repeatedly discouraged this practice by the bench and the bar because of "the 'difficulty and peril inherent in such a task.' " (*Id* at p. 667.) Indeed, our Supreme Court has cautioned "[c]ounsel trying to clarify the jury's task by relating it to a more

common experience must not imply that the task is less rigorous than the law requires." (*Id.* at p. 671.) As such, arguments comparing the reasonable doubt standard to matters of common sense and the certainty associated with everyday decisions like changing lanes or whether to marry have been routinely disapproved. (See *People v. Romero* (2008) 44 Cal.4th 386, 416; *People v. Ngyuen* (1995) 40 Cal.App.4th 28, 36.)

Here, the prosecutor's challenged remarks, viewed in isolation, were misleading to the extent they equated reasonable doubt with being "pretty certain the defendant did it." However, even if we assume that the prosecutor erred by uttering this phrase, when we view the statements in context, we find no reasonable likelihood that the jury applied the challenged remarks in an objectionable fashion.

We draw on our Supreme Court's analysis in *Cortez*. In *Cortez, supra,* 63 Cal.4th 101, the prosecutor stated during his rebuttal argument that the beyond-a-reasonable-doubt standard " 'means . . . you look at the evidence and you say, "I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me. . . ." ' 'That's proof beyond a reasonable doubt.' " (*Id.* at p. 130.) The trial court overruled the defendant's objection. (*Ibid.*) *Cortez* held that the prosecutor's "challenged remarks, viewed in isolation, were incomplete at best," but did not reverse the judgment. (*Id.* at p. 131.) The *Cortez* court analyzed at length why, " ' "[i]n the context of the whole argument and the instructions" [citation], there was [not] "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." ' " (*Id.* at pp. 130-134.) All of those reasons apply here.

First, *Cortez* found it was "significant that the trial court properly defined the reasonable doubt instruction in both its oral jury instructions and

the written instructions it gave the jury to consult during deliberations." (*Cortez*, *supra*, 63 Cal.4th at p. 131.) It also noted that " 'juries generally understand that counsel's assertions are the "statements of advocates." Thus, argument should "not be judged as having the same force as an instruction from the court." ' " (*Id.* at pp. 131-132.) Likewise, here, the trial court properly instructed the jury with CALCRIM No. 200 regarding its obligation to follow the law set forth in the instructions, and to disregard attorney comments that were inconsistent with the instructions. The jury was also instructed with CALCRIM No. 222, that "[n]othing that the attorneys say is evidence," as well as CALCRIM No. 220, which correctly instructed the jury about the presumption of innocence and the prosecutor's burden of proving guilt beyond a reasonable doubt. The trial court verbally instructed the jury with these instructions at the start of trial and again after closing arguments. The jury also received the same instructions in written form before it began deliberations.

Second, *Cortez* found it was "significant that defense counsel emphasized the court's instructions on reasonable doubt numerous times during closing argument." (*Cortez*, *supra*, 63 Cal.4th at p. 132.) Here, defense counsel did not explicitly refer the jury to the reasonable doubt instruction. But she repeatedly referred to the beyond-a-reasonable-doubt standard and emphasized that it was the prosecutor's burden of proof.

Third, *Cortez* found that it was "significant . . . that the prosecution's comments on reasonable doubt specifically referred the jury to the court's instruction on the subject." (*Cortez*, *supra*, 63 Cal.4th at p. 132.) Here, the prosecutor emphasized repeatedly he had the burden to prove every element beyond a reasonable doubt.

Fourth, *Cortez* found it was "significant that the challenged statement was a brief, isolated remark . . . ." (*Cortez*, *supra*, 63 Cal.4th at p. 133.) Here, the prosecutor's arguments about the reasonable doubt standard covered several pages. But Foster's claim of error rests on one sentence. In comparison to the month-long trial and extensive closing arguments, the challenged comment was certainly isolated and brief.

Finally, of particular relevance here, *Cortez* noted that the prosecutor's remark was "offered in response to defense counsel's misleading comments on the subject." (*Cortez*, *supra*, 63 Cal.4th at p. 133, *cf. Rodriguez, supra,* 9 Cal.5th at pp. 484-485 [misconduct cannot be justified on ground that defense counsel "started it" with similar improprieties].) Likewise, here, the prosecutor's comment came in response to multiple misstatements by defense counsel. As we have noted, the prosecutor's misstatement was a misbegotten attempt to clarify the reasonable doubt standard that had been muddled by defense counsel's argument that the jurors could believe in their "heart of hearts" that Foster was guilty, but still have a reasonable doubt.

In summary, the challenged comments were brief and constituted a small and isolated part of the prosecution's argument, the prosecution was responding to defense counsel comments, the court properly defined "reasonable doubt," and the jury had written instructions during deliberations that properly defined the standard. The fact that the jury acquitted Foster of attempted forcible sodomy indicates that the jury understood the reasonable doubt standard and carefully applied it.

On this record we conclude there was no reasonable likelihood the jury construed or applied the prosecution's challenged remarks in an objectionable fashion.[4]

III. Admission of Prior Uncharged Sexual Offenses

Foster contends the trial court violated his due process right to a fair trial and abused its discretion when it granted the prosecutor's motion to admit evidence of uncharged sexual offenses against victims T. and V. pursuant to Evidence Code section 1108. These contentions are unpersuasive.

Evidence Code section 1108 permits the trier of fact to consider evidence of uncharged sexual offenses " ' "as evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense." ' "[5] (*People v. Falsetta* (1999) 21 Cal.4th 903, 912 (*Falsetta*).) Foster argues Evidence Code section 1108 is unconstitutional because it permits evidence of a defendant's prior crimes to be admitted to show a defendant's propensity to commit such crimes again. He acknowledges that the California Supreme Court upheld section 1108 against just such a due process challenge in *Falsetta* but raises the issue to preserve it for federal review. We reject the assertion, as we must. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

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[4] Because we have rejected Foster's other claims of prosecutorial misconduct, his claim of cumulative error necessarily fails.

[5] "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a).)

Foster also contends the court should have excluded evidence concerning T. and V. pursuant to Evidence Code section 352. We review the ruling to admit the evidence for abuse of discretion (*Falsetta*, *supra*, 21 Cal.4th at pp. 917-918), and find none. Foster contends "the prior incidents involved lesser, dissimilar acts of furtive and crude touching that showed no propensity for the far more invasive and intimate sexual acts of forced oral copulation and forcible intercourse charged in this case." We disagree.

The cases are clear that evidence Foster committed other sex offenses is at least circumstantially *relevant* to the issue of his disposition or propensity to commit the charged offenses. (*Falsetta, supra,* 21 Cal.4th at p. 915.) Evidence Code section 1108 contains no predicate requirement that there be an unusually high degree of similarity. (See *People v. Soto* (1998) 64 Cal.App.4th 966, 984.) Clearly, "[t]he charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41; see also *People v. Mullens* (2004) 119 Cal.App.4th 648, 659.) Indeed, "[i]t is enough the charged and uncharged offenses are sex offenses as defined in [Evidence Code] section 1108." (*People v. Frazier, supra,* at pp. 40-41; accord, *People v. Mullens, supra,* at p. 659; see also Evid. Code, § 1108, subd. (d)(1)(A).)

"With the enactment of section 1108, the Legislature 'declared that the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness.' " (*People v. Soto, supra,* 64 Cal.App.4th at p. 983.)

We are unpersuaded that the prior sexual offense evidence in this case was unduly prejudicial. "[T]he test for prejudice under Evidence Code section 352 is not whether the evidence in question undermines the defense or helps demonstrate guilt, but is whether the evidence inflames the jurors' emotions, motivating them to use the information, not to evaluate logically the point upon which it is relevant, but to reward or punish the defense because of the jurors' emotional reaction." (*People v. Valdez* (2012) 55 Cal.4th 82, 145.)

Foster contends that the testimony of T. and V. was unacceptably inflammatory because T. and V. were "more credible [than L.] and actually present before the jury[,]" which "provided the jury with a vivid picture of Foster as a man prone to inappropriate sexual acts against females in public." This type of testimony, Foster maintains, was "highly damaging" to his ability to defend against the more serious allegations made against him by L. We disagree. The testimony of T. and V. did not relate to collateral factors. Rather, this testimony was highly probative in disproving Foster's consent defense.

Finally, Foster's claim of undue prejudice cannot readily be squared with the fact that, although the jury convicted him of some of the sexual charges, it acquitted him of attempted forcible sodomy.

Accordingly, we conclude the court's ruling was well within its discretion.

IV. Mental Health Diversion

Foster claims that his case should be remanded for the trial court to determine whether he is eligible for pretrial mental health diversion under section 1001.36.

Section 1001.36 authorizes a pretrial diversion program for defendants with qualifying mental disorders. The statute defines " 'pretrial diversion' "

as "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment . . . ." (§ 1001.36, subd. (c).) The stated purpose of section 1001.36 "is to promote all of the following: [¶] (a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety. [¶] (b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings. [¶] (c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders." (§ 1001.35.)

"As originally enacted, section 1001.36 provided that a trial court may grant pretrial diversion if it finds all of the following: (1) the defendant suffers from a qualifying mental disorder; (2) the disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to mental health treatment; (4) the defendant consents to diversion and waives his or her speedy trial right; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (Former § 1001.36, subd. (b)(1)-(6).) Section 1001.36 was subsequently amended by Senate Bill No. 215 (2017-2018 Reg. Sess.) . . . to specify that defendants charged with certain crimes, such as murder and rape, are ineligible for diversion. (§ 1001.36, subd. (b)(2), as amended by

Stats. 2018, ch. 1005, § 1.)" (*People v. Frahs* (June 18, 2020, S252220) 9 Cal.5th 618 [2020 WL 3429139] (*Frahs*).)[6]

Until recently, there had been a split of authority regarding the retroactivity of section 1001.36 to criminal convictions that were not yet final. In *Frahs, supra,* 2020 WL 3429139, our Supreme Court ended this debate, by holding the ameliorative nature of the diversion program placed it squarely within the spirit of the rule that amendatory statutes lessening the punishment for criminal conduct are intended to apply retroactively. (*Id.* at *3, 6.) The high court applied section 1001.36 to defendant Frahs—whose appeal had been pending when the Legislature enacted the diversion statute—and determined he was entitled to a conditional limited remand for a mental health diversion eligibility hearing. (*Id.* at *2, 12.) The court based this determination on the affirmative disclosure in the record that the defendant—who had been diagnosed with " 'a combination of schizophrenia and bipolar disorder' " known as schizoaffective disorder—appeared to meet at least the first threshold eligibility requirement for mental health diversion— the defendant suffers from a qualifying mental disorder (§ 1001.36, subd. (b)(1)(A)). (*Id.* at *12.)

The Attorney General argues that even if Foster is entitled to retroactive application of section 1001.36, he is not eligible for diversion because, as we have described, the 2019 amendment excludes defendants such as Foster charged with rape or any registrable section 290 offense. Foster argues that applying the 2019 amendment retroactively would violate

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[6] This amendment, which we will discuss further, was passed September 30, 2018, and became effective January 1, 2019. (2018 Cal. Legis. Serv. ch. 1005 (S.B. 215).) Hereafter, we will refer to it as the 2019 amendment.

the ex post facto clauses of the California and federal Constitutions. (U.S. Const., art. 1, § 9, cl. 3, § 10, cl. 1; Cal. Const., art. I, § 9.)

Whether retroactive application of the 2019 amendment violates the ex post facto clauses of the California and federal Constitutions is currently pending before our Supreme Court. (*People v. McShane* (2019) 36 Cal.App.5th 245, 259, review granted Sept. 18, 2019, S257018 [no ex post facto violation in retroactive application of 2019 amendment]; *People v. Cawkwell* (2019) 34 Cal.App.5th 1048, 1053, review granted Aug. 14, 2019, S256113 [same].) We need not reach the issue, however, as Foster's claim fails for the more fundamental reason that he forfeited his claim by failing to seek pretrial diversion in the trial court.

A brief timeline makes this clear. Section 1001.36 was enacted and became effective on June 27, 2018. This was one week after Foster's trial began on June 20 with voir dire and more than three months before his sentencing on October 12, 2018.[7] By its terms, a request for pretrial diversion under section 1001.36 can be made in the trial court "[*a*]*t any stage of the proceedings*."[8] (§ 1001.36, subd. (b)(3), italics added.) Foster never did. Because Foster had the ability to request relief from the trial court, but failed to do so, he has forfeited any claim to relief under section 1001.36 on appeal.

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[7] We note that the appellate decision in *People v. Frahs*, which held that section 1001.36 applied retroactively to nonfinal cases, was filed nearly two weeks before Foster was sentenced, calling further attention to the existence of the statute. (See *People v. Frahs* (2018) 27 Cal.App.5th 784, 791.)

[8] Section 1001.36 (b)(3) provides in part: "At any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion."

(See *People v. Trujillo* (2015) 60 Cal.4th 850, 856 [holding forfeiture rule applies in context of challenges to a fee order; forfeiture results from the failure to assert a right in the tribunal having jurisdiction to determine it]; *People v. Carmony* (2004) 33 Cal.4th 367, 375-376 [failure to seek dismissal pursuant to section 1385 forfeits right to raise issue for first time on appeal]; *People v. Scott* (1994) 9 Cal.4th 331, 353 [failure to object to discretionary sentencing choices forfeits challenges on appeal].)

Foster contends that forfeiture should not apply here because his attorney's failure to raise the issue "very likely resulted from unfamiliarity with the passage of this new diversion program." As a general rule, "a party may forfeit [the] right to present a claim of error to the appellate court if he did not do enough to 'prevent[ ]' or 'correct[ ]' the claimed error in the trial court . . . ." (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) The forfeiture doctrine is not absolute, however, as we are "generally not prohibited from reaching a question that has not been preserved for review by a party." (*Ibid.*) But Foster does not ask us to reach a legal question that he failed to preserve for review or, for that matter, even ask us to correct a claimed error made by the trial court. Rather, he seeks remand to allow him to pursue a section 1001.36 pretrial diversion program that he did not pursue below, despite that the program was in place when he was tried, convicted, and sentenced. Under these circumstances, we decline to overlook the forfeiture rule. (See, e.g., *People v. Carmony, supra,* 33 Cal.4th at pp. 375–376 [where defendant failed to invite the trial court to exercise its discretion, he forfeited his right to raise the issue on appeal].)

This brings us to Foster's alternative argument, that he received ineffective assistance of counsel due to his counsel's apparent failure to seek

pretrial diversion. This argument is made in passing as part of an omnibus claim of ineffective assistance of trial counsel.

It is well established that to prevail on a claim for ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's errors there is a reasonable probability that the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 693; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) It is equally well established that "[i]t is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009; accord, *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267 [habeas corpus is the more appropriate procedure to address an ineffective assistance of counsel claim because it may include evidence of an attorney's reasons for making the complained-of decision, which is outside the appellate record].) These rules preclude us from finding ineffective assistance of counsel here.

The record is silent as to why defense counsel did not pursue pretrial diversion in the trial court. While Foster claims he received ineffective assistance of counsel because "there was sufficient evidence available to trial counsel to recognize Foster's potential qualification for diversion," the record does not foreclose the possibility that trial counsel did not seek pretrial diversion for a sound reason. For example, defense counsel may have

consulted with Foster regarding the possibility of pretrial diversion, only to have Foster reject the idea because he did not believe he needed mental health treatment. One of the threshold eligibility requirements for mental health diversion is that the defendant "agrees to comply with treatment." (§ 1001.36, (b)(1)(E).) Defense counsel may have obtained information regarding defendant's mental health history and determined he did not satisfy the requirements for diversion. (See § 1001.36 (b)(1)(A)-(F).) These and myriad other possibilities compel us to conclude it is inappropriate to decide Foster's ineffective assistance of counsel claim on direct appeal.

V. Ability to Pay Fines and Fees

Foster argues that remand is required to determine his ability to pay the fines and fees imposed by the trial court.

At sentencing, the trial court imposed a $10,000 restitution fine (§ 1202.4, subd. (b)), imposed and stayed a parole revocation fine of $10,000 (§ 1202.45), imposed a $120 court operations fee (§ 1465.8), and imposed a $120 criminal conviction fee (Gov. Code, § 70373). On appeal, Foster argues these fees and the restitution fine should be stayed until the trial court determines whether he has the ability to pay them under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). Foster concedes that his trial counsel did not object to the imposition of the fines and fees he now challenges. We find that Foster forfeited his claim as to the restitution fine, but not as to non-punitive court fees.

Dueñas held that due process requires a trial court to conduct a hearing to ascertain a defendant's ability to pay before imposing court facilities and court operations assessments under section 1465.8 and Government Code section 70373. (*Dueñas, supra,* 30 Cal.App.5th at p. 1164.) *Dueñas* further held that restitution fines under section 1202.4 must be imposed and stayed

unless and until the People demonstrate that a defendant has the ability to pay the fine. (*Id.* at pp. 1172-1173.)

Courts after *Dueñas* have reached different conclusions on the issue of forfeiture. (Cf. *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 [finding forfeiture, as "*Dueñas* applied law that was old, not new"] with *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [declining to find forfeiture for "a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial."]; *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 (*Johnson*) [noting while *Dueñas* was founded on longstanding constitutional principles, the statutes at issue "were routinely applied for so many years without successful challenge [citation], [the court was] hard pressed to say its holding was predictable and should have been anticipated"].)

We agree with the *Castellano* and *Johnson* courts. Given courts' longstanding routine imposition of statutory fees, fines, and assessments prior to *Dueñas*, we do not think it reasonable to say the constitutional rule announced in that case should have been anticipated by all competent counsel. Accordingly, we decline to find the issue of the non-punitive court-related fees forfeited.

On the merits, *Dueñas* has met some resistance and, in any event, is distinguishable. (E.g., *People v. Caceres* (2019) 39 Cal.App.5th 917, 923, 926, review den. Jan. 2, 2020 [*Dueñas* due process analysis did "not justify extending its holding beyond those facts"]; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1060, review den. Dec. 11, 2019 [*Dueñas* wrongly decided; constitutional challenge to imposition of fines, fees, and assessments should be based on excessive fines clause of Eighth Amendment]; *People v. Hicks* (2019) 40 Cal.App.5th 320, 325–329, review granted Nov. 26, 2019, S258946

[*Dueñas* wrong to conclude due process considerations may bar assessments, fines, and fees; such costs and fines do not deny criminal defendants access to courts]; *People v. Kopp* (2019) 38 Cal.App.5th 47, 95–97, review granted Nov. 13, 2019, S257844 [rejecting *Dueñas* analysis with respect to restitution fines, which should be analyzed under excessive fines clause, but following *Dueñas* as to court fees and assessments].)

In *Dueñas*, the defendant, an unemployed, homeless mother with cerebral palsy, had her driver's license suspended because she could not afford to pay some assessments stemming from three juvenile citations. Unable to have her license reinstated because she could not pay the fees, the defendant suffered three misdemeanor convictions for driving with a suspended license; each time, she served jail time in lieu of payment but remained liable for the court fees associated with each conviction. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1160-1161.) After pleading no contest to a fourth misdemeanor charge of driving with a suspended license, the defendant asked for a hearing to determine her ability to pay the fees assessed. The trial court determined that the court fees were mandatory and she had not shown compelling and extraordinary reasons to justify waiving the restitution fine of $150. (*Id*. at pp. 1162-1163.)

The Court of Appeal reversed, holding, "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments" and "the execution of any restitution fine . . . must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1164.)

Foster's situation is not like the defendant in *Dueñas*. Foster was healthy, relatively young, and had been able to work cash jobs to support himself. While Foster could not be described as financially stable, the total amount imposed here is not analogous to the financial situation that defendant Dueñas was up against. Not only does the record show Foster had some past income-earning capacity but, going forward, he will have the ability to earn prison wages over a sustained period. (See *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [ability to pay includes a defendant's ability to obtain prison wages]; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1035 [defendant's ability to earn money in prison "forecloses a meritorious inability to pay argument"].) The idea that he cannot afford to pay $210 over the course of the 75-year prison term imposed in this case is untenable.[9] (*Johnson, supra,* 35 Cal.App.5th at p. 139 [reasonable for defendant to pay $370 in fees while serving eight-year prison term].) Thus, even if we were to assume Foster is correct that he suffered a due process violation when the court imposed this rather modest financial burden on him without taking his ability to pay into account, we conclude that, on this record, because he has ample time to pay it from a readily available source of income while incarcerated, the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The imposition of the restitution fine requires a different analysis. Even before *Dueñas*, section 1202.4 permitted the trial court to consider a defendant's inability to pay a restitution fine in excess of the minimum fine. (*Jones, supra*, 36 Cal.App.5th at p. 1032.) Here the trial court imposed a $10,000 restitution fine (the maximum) with no objection at sentencing by

[9] As we will discuss in the next section, the criminal conviction fee should have been $90, which reduces the total fees to $210.

Foster's counsel. Having failed to make the argument in the trial court, it is forfeited. (See *Johnson, supra,* 35 Cal.App.5th at p.138, fn. 5; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154 [finding *Dueñas* error forfeited, in part because restitution fine was $10,000]; *Jones, supra,* 36 Cal.App.5th at p. 1033 [agreeing with *Frandsen* on this point].)

As *Johnson* noted, "[t]he distinction between minimum and above minimum restitution fines has consequences for the applicability of forfeiture doctrine." (*Johnson, supra,* 35 Cal.App.5th at p. 138, fn. 5.) In finding that that defendant had not forfeited his challenge to the minimum restitution fine imposed in that case, the *Johnson* court explained: "Had the court imposed a restitution fine on Johnson above the statutory minimum, we would have come to the opposite conclusion on the issue of forfeiture, at least for purposes of that fine, since, there, it could be said that he passed on the opportunity to object for lack of ability to pay." (*Ibid.*)

Here, too, Foster passed on his opportunity to object on the basis of his inability to pay. Thus, Foster has forfeited his claim of *Dueñas* error with respect to the $10,000 restitution fine.

Foster argues that if he has forfeited his argument on the ability to pay the restitution fine, he has a claim for ineffective assistance of counsel. As we have explained, it is particularly difficult to prevail on a claim of ineffective assistance on direct appeal. (*People v. Mai, supra,* 57 Cal.4th at p. 1009.) Here, the record is silent as to why defense counsel raised no objection to the imposition of a $10,000 restitution fine based on Foster's ability to pay. Perhaps counsel had good reason not to do so—perhaps not. Accordingly, we conclude it is inappropriate to decide Foster's ineffective assistance of counsel claim on direct appeal.

VI. Amount of the Criminal Conviction Fee

Government Code section 70373, subdivision (a) requires the imposition of a $30 assessment for each felony criminal conviction "[t]o ensure and maintain adequate funding for court facilities . . . ." The trial court imposed a $120 assessment for Foster. As the parties note, since Foster was convicted of three felony counts, the assessment should have been $90. We will reduce the fee accordingly.

DISPOSITION

The judgment is modified to reduce the criminal conviction assessment fee (Gov. Code, § 70373) to $90. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment to reflect the reduction of the criminal conviction assessment fee and forward a certified copy to the Department of Corrections and Rehabilitation.

_____
Miller, J.

WE CONCUR:

_____
Kline, P.J.

_____
Stewart, J.

A155739, *People v. Foster*